No. 12,673

IN THE

United States Court of Appeals

For the Ninth Circuit

COLES TRADING COMPANY, a Corporation,
Appellant,

vs.

SPIEGEL, INC., a Corporation,
Appellee.

APPELLANT'S BRIEF

Upon Appeal from the District Court of the United States for the District of Arizona.

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JURISDICTIONAL STATEMENT

This is an appeal by the Coles Trading Company, as plaintiff, from a final judgment in favor of the defendant entered on July 3, 1950. Notice of appeal, accompanied by a supersedeas bond, was filed July 31, 1950 (R. 38, 39).

Jurisdiction of this appeal exists under Title 28, U.S.C., Section 1291, and Title 28, U.S.C., Section 2107. Jurisdic-

tion existed in the District Court under Title 28, U.S.C., Section 1332(a)(1).

Plaintiff instituted the action on April 18, 1949, by filing its complaint in the District Court of the United States for the District of Arizona, wherein judgment was sought against the defendant in the principal amount of four thousand five hundred and seventeen dollars and eighteen cents ($4,517.18) (R. 5), and wherein it was alleged that the plaintiff is a corporation existing under the laws of Arizona and that the defendant is a corporation existing under the laws of Delaware (R. 2). By its answer, the defendant admitted the jurisdictional allegations of the complaint (R. 22).

STATEMENT OF THE CASE

In April, 1938, the plaintiff leased from J. W. and Sallie G. Dorris three-fifths of a store building in downtown Phoenix.[1] The lease was to expire in 1949 with an option given to the plaintiff to renew for an additional period of ten years.[2]

Among the terms of this lease was a provision obligating the lessee to pay a three-fifths part of all property taxes in excess of $15,000, if, in any one year, the taxes should exceed that amount (R. 12, 13). The lease was to be binding on the successors and assigns of both parties (R. 14).

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[1]The lessors later died, and title to the building is now held by a Phoenix bank as trustee. For the sake of convenience, both will be referred to simply as "owner." Plaintiff corporation was then doing business as the "Dorris-Heyman Furniture Co." It later changed its name to "Coles Trading Co.," and where convenient will be referred to as "Coles."

[2]The option has been exercised and the lease is now in full effect under the extended term.

Seven years later, the plaintiff sold to Spiegel the entire furniture business—including accounts and stocks of merchandise—in which it had been engaged on the leased premises (R. 45, 46).

To consummate this sale, the plaintiff's president, Frank E. Coles, made a trip to Chicago to confer with the officials of defendant, Spiegel, Inc. He was not accompanied by counsel, nor was he represented by counsel at the subsequent negotiations. After discussions on the matter of the store building, one William H. Klein, an attorney and assistant secretary of the defendant corporation, drew up a contract designated as a "Sub-lease"; by which the plaintiff transferred to the defendant the remainder of its term in the leased premises for a larger consideration than the rental paid by Coles to the owner. The contract was signed in Chicago by the proper officers of Spiegel and by Mr. Coles. Mr. Coles then returned to Phoenix where the secretary of the plaintiff corporation also signed the contract, and where the signatures were acknowledged. The effect of this instrument is the subject of the present controversy.

By the terms of the contract, Coles transferred the property to Spiegel "subject to the terms of, and with all the rights, privileges and benefits granted" to Coles under the lease from the owner (R. 17). A photostatic copy of that lease was attached to the contract and by express stipulation was made a part of it (R. 17). In addition to the provision dealing with taxes, the original lease from the owner provides that the lessee shall also

(1) pay the excess cost of an eight point insurance policy over that of a fire policy (R. 8),

(2) pay for boiler explosion insurance (R. 8),

(3) pay half the cost of maintaining the heating plant (the rest is borne by the tenant of the other two-fifths of the building) (R. 17),

(4) make such repairs as may be necessary to keep the premises in good condition (R. 17).

No period of grace is given to the lessee.

The contract between Coles and Spiegel provides (R. 17) that "It is expressly understood and agreed, however, that anything in said over-lease to the contrary notwithstanding," Spiegel

(1) shall not be required to make structural repairs,

(2) shall not be in default "on matters other than rent" until thirty days after notice.

For four years afterwards, Spiegel, as tenant of the building, paid the amounts due on the two insurance policies and paid its share of the cost of maintaining the heating plant (R. 57). Towards the end of 1948, evidently for the first time, the taxes assessed against the property exceeded $15,000. When billed by the owner for the part of this excess due under the lease, Coles turned to Spiegel; but Spiegel refused the demand, and the bill was paid by Coles (R. 5, 25). Spiegel then repudiated all obligations arising under the original lease, and refused to make further payments for the insurance or for the upkeep of the heating system (R. 57).

More than thirty days after notice to the defendant, Coles brought this action to recover the amount paid on account of the excess taxes.

At the trial, evidence was adduced supporting the foregoing statement, and showing that all the participants re-

ferred to the contract in question as a "Sub-lease," and that the owner consented to the arrangement only on condition that Coles should continue to be bound.

The court ruled that the contract did not impose an obligation on Spiegel to pay the taxes, and judgment was entered for Spiegel.

From that judgment Coles appeals.

SPECIFICATIONS OF ERRORS

I.

The District Court erred in finding that the instrument in question contained no provision requiring Spiegel to pay the excess taxes, since an examination of the contract shows that the defendant undertook to perform all of the obligations of the lease not otherwise dealt with.

II.

The District Court erred in finding that it was not the intention of the parties that Spiegel should pay the excess taxes, since such a finding is contrary to the provisions of the written contract and contrary to the evidence.

III.

The District Court erred in its conclusion of law that no legal obligation had been proved requiring Spiegel to pay the excess taxes, since the contract between the parties establishes such an obligation, and since the contract, being in reality an assignment, imposes that obligation on Spiegel as a matter of law.

SUMMARY OF ARGUMENT

By incorporating into its contract with Coles a copy of Coles' lease with the owner, Spiegel accepted the provisions of that lease and assumed all the obligations there imposed on the tenant which were not otherwise covered by agreement between the parties. If that is not true, then the care taken to attach a photostatic copy of the original lease, and to provide specifically that it become a part of the contract was an empty ritual. If any doubt remained, it would be dissipated by an examination of the contract itself, which demonstrates that Spiegel considered itself bound by the lease, since it felt constrained to make certain exceptions to the burdens imposed upon it—particularly the duty to make all necessary repairs, and the duty to perform promptly. Spiegel obtained a reduction of these burdens by a provision excusing it from making structural repairs, and by another allowing it a thirty-day period of grace "on matters other than rent." Unless the obligations of the original lease were intended to be a part of this contract, then there were no "matters other than rent" on which Spiegel could have been in default. Added to all this is the stipulation that the conveyance is made "subject to the terms of, and with all the rights, privileges and benefits" granted to Coles under the original lease.

Even if the lease had not been incorporated into this contract, and even if the lease had never been referred to in the contract, and even—in fact—if Spiegel had never known that the lease existed (assuming a proper recording), Spiegel would nevertheless be obligated by law to pay these taxes. By accepting a transfer of all that Coles possessed, Spiegel subjected itself to all covenants which run with

the land, and the covenant to pay the taxes is one running with the land.

If Spiegel wished to escape the liability for these taxes, it was incumbent upon Spiegel to insert in the contract a provision so stating, assuming it could have persuaded Coles to agree (which, of course, it could not have done).

The instrument now before this court was the culmination of a conference in Spiegel's office where Spiegel was represented and acted by its lawyer, whereas Coles was not so represented. Furthermore, every provision in the contract was composed by William H. Klein, who was not only the attorney for Spiegel, but one of its executives.

As a matter of the proper interpretation of contracts and the rules of property law, no other conclusion is possible but that Spiegel is obliged to pay these taxes.

ARGUMENT

I. Under the Contract Between the Parties, Spiegel Assumed the Obligation to Pay Excess Taxes.

Entirely apart from the law of assignments, a reading of the contract between Coles and Spiegel is sufficient, of itself, to establish an undertaking by Spiegel to perform the obligations of the original lease as to all matters not otherwise covered. The judgment of the District Court overlooks the fact that a copy of the lease was attached to, and made a part of, the contract, and that several provisions of the contract are meaningless unless it was intended that Spiegel be bound by the lease.

Because of the transaction out of which this contract grew, and because of the interpretation put on it by Spiegel, itself, any doubt about its effect must be resolved in favor of Coles.

A. BY THE PHYSICAL INCORPORATION OF THE LEASE, AND BY THE REFERENCES MADE TO IT IN THE CONTRACT, SPIEGEL ASSUMED ITS BURDENS.

An examination of the contract upon which this action is brought would reveal that it is made up of two parts—an agreement signed by Coles and Spiegel and, attached to that, a copy of a lease signed by Coles and the owner. It will not be assumed that this second part is there for no other purpose than to make a more impressive looking document. It is there because the parties intended it to have some effect upon the first part of their contract. And if that is what the parties intended, then the law will recognize and give effect to such intent. Without so much as a glance at the provisions of either part of the contract, the inference immediately arises that the parties must have intended to make use of some of the provisions of the copy.

Each instrument is in the form of a lease. The copy imposes certain obligations on the lessee, Dorris-Heyman, (Coles' former name) and the other provides that the premises are leased to Spiegel, Inc., "subject to the terms of, * * *, a certain lease * * *, a photostatic copy of which over-lease is attached hereto and made a part hereof" (R. 17).

Included among the "terms of" that lease are the provisions requiring the lessee to bear a part of the taxes in excess of $15,000, to pay for certain insurance, and to make whatever repairs might be necessary to keep the premises in good condition. If Spiegel did not think itself bound by these terms, then there was no point in providing that Spiegel should *not* be required to make any "structural" repairs "anything in said over-lease to the contrary notwithstanding." The over-lease provides that if the premises are entirely destroyed, then both parties will be released

from any further obligation. If Spiegel did not think itself bound by this term, then there was no point in providing that it *alone* should have an election to terminate "notwithstanding" anything in the overlease. The over-lease provides that rent shall be paid promptly and without demand. If Spiegel did not think itself bound, then there was no point in providing for a fifteen-day period of grace "notwithstanding" anything in the over-lease, and with a right to set-off against the rent any money owed to it by Coles "notwithstanding" anything in the over-lease. The overlease contains no provision for termination except for total destruction by fire. If Spiegel did not think itself bound by the lease, then there was no point in providing that it should have a right to terminate in case of eminent domain proceedings "notwithstanding" anything in the over-lease. If the terms of the over-lease are disregarded, then Spiegel made a promise of a certain monthly payment and a promise to make ordinary repairs, but incurred not a single other duty or obligation. Unless Spiegel thought that the overlease imposed additional obligation upon it, then there was small necessity for providing a thirty-day period of grace "on matters other than rent." If the over-lease is not a part of the contract, then there was only one "matters other than rent."

The only reasonable conclusion is that the parties intended to do what they said they intended to do—make the prior lease a part of the agreement. The District Court was not justified in ignoring a part of the contract that seems crucial to the issue.

This contention is further re-enforced by the provision that the transfer is made "subject to the terms of" the lease.

Probably there are as many definitions of that phrase as there are cases in which it has arisen, and the only assistance to be drawn from them is that the meaning changes with the context. Where a conveyance of land is made "subject to" a mortgage, it is ordinarily held that the grantee is not personally liable. But that does not make the phrase meaningless, for there is still the land to be liable for the debt. Here, unless Spiegel is subject to liability on the lease, that phrase means nothing. In this case it cannot be said that the owner's own land is liable on an obligation to the owner. Only Spiegel remains as a subject in which this phrase can apply. The ruling of the District Court is the equivalent to striking it out entirely.

The court in *Homan v. Employers Reinsurance Corporation,* 345 Mo. 650, 136 S.W.2d 289 (1939), held that the phrase "subject to" was sufficient to bind a defendant by the terms of a prior contract to which it was not a party. The defendant had made a contract to indemnify the now bankrupt insurance company "subject to" the conditions of the original policy. The holder of that policy, unable to collect from the insolvent insurance company, brought action against the defendant. Judgment was given for the policyholder despite the absence of any loss to the bankrupt. The court said:

> "* * * The words 'subject to' are defined by lexicographers as meaning 'liable,' and the word 'liable' is defined as 'bound or obligated in law or equity; responsible; answerable.' * * *"

Furthermore, the contract provides that Coles shall use its best efforts to persuade the owner to allow Spiegel to sublet the premises (R. 19). Unless Spiegel intended that

the original lease should form a part of its contract, then it could be no concern of Spiegel's what the owner might do. If Spiegel did not assume the lease then there was no privity of contract between Spiegel and the owner, and such consent would be unnecessary. Spiegel, by inserting this provision, plainly showed that it thought itself bound by the over-lease, which prohibits subletting without the permission of the owner (R. 9).

In that same paragraph of the contract (R. 9), it is provided that this consent from the owner is to be obtained "on the condition that" Spiegel "shall not thereby be relieved of any liability." If Spiegel was never liable to the owner, then it had no need to provide for a continuation of that liability. Again, the indication is clear that Spiegel intended to assume the original lease.

Finally, there must be considered the action of the parties in attaching a copy of the lease to the contract and making it "a part hereof." There was no purpose in doing this unless the parties intended to incorporate the lease into their contract. The effect of this incorporation can only be that the "lessee" under the second agreement accepted the obligations imposed on the "lessee" in the first agreement, with whatever exceptions the parties might agree upon. Destruction by fire, repairs, rent, termination, and the duty of prompt performance were dealt with in the primary agreement. As to all other matters, the provisions of the attached copy must control. By agreeing to take the transfer "subject to the terms of" the lease, and by providing that a copy "is attached hereto and made a part hereof," Spiegel assented to that proposition and cannot now escape it. *City of Lake View v. MacRitchie,* 134 Ill. 203, 25 N.E. 663 (1890).

The action of the District Court was equivalent to tearing off the copy, striking out the phrase "subject to the terms of," striking out the incorporation provisions, and striking out the "notwithstanding" clause. As thus mutilated, the contract might provide what Spiegel now says it does. But as thus mutilated, it would not be the same contract which Coles signed. It would be the grossest injustice to impose obligations on Coles under a purported contract which it never assented to, never read, and never signed; or never heard of until Spiegel asserted it in the lower court.

B. THE CIRCUMSTANCES SURROUNDING THE MAKING OF THE CONTRACT AND THE CONDUCT OF THE PARTIES SUPPORT THIS CONSTRUCTION.

There is within the four corners of the instrument sufficient indication of the parties' intention to justify a reversal of the judgment below. If, however, the court should find some ambiguity in the contract, then it is proper to look at the circumstances surrounding its execution, and at the construction which the parties themselves have placed upon it. *Pendleton v. Brown,* 25 Ariz. 604, 221 Pac. 213 (1923); *Paine v. Copper Belle Mining Co.,* 13 Ariz. 406, 114 Pac. 964 (1911).

Coles operated a retail store in the leased building. That business, as a going concern, was sold to Spiegel and the contract here in question was a part of the transaction. Since Coles had no further interest in the business, it could want no further interest in the building. All that Coles could want from Spiegel was the payment of the stipulated sum every month. Aside from that, it would naturally wish to wash its hands of the whole business. However, it could

not completely do so because of its obligations to the owner under the original lease. The logical answer would be to have the new tenant assume the obligations of the lease. It submits that Spiegel has done precisely that.

At the negotiations which preceded the drawing of this lease the defendant was represented by its attorney, Mr. Klein. When it came to the actual drawing up of the contract, that, too, was done by Mr. Klein. Although the instrument was taken back to Phoenix for the signature of the plaintiff's secretary, not a syllable of it was changed. The final product is the work of the defendant's own attorney, who was also one of its officers. Consequently, the defendant must bear the responsibility for any ambiguity. *Gardner v. Trigg,* 59 Ariz. 397, 129 Pac.2d 666 (1942); *Hoover v. Odle,* 31 Ariz. 147, 250 Pac. 993 (1926).

That the construction here contended for is the one then accepted by the parties, may be seen from the futility of Mr. Klein's own attempts to put any other meaning on the agreement.

At the trial, when Mr. Klein was questioned about the differences between the original lease and the contract which he drew up—differences in the fire, termination and repair clauses—the following exchange took place:

> "Q. And you told Mr. Coles that you would not assume the obligation to make structural repairs to the building, did you not, either you or Mr. Spiegel, in your presence?
>
> A. I said that that was a point which we would want clearly covered in the agreement.
>
> Q. Yes. In other words, you said that that was one of the obligations in the over-lease which Spiegel would not assume?

A. No sir. I said that that was one of them which we would not take subject to."

* * * * * * *

"A. I said that we would except those things from the things that we took subject to." (R. 91, 92)

It is submitted that Mr. Klein's explanation is asinine. It was completely senseless to "except those things from the things that" he "took subject to" unless he knew that Spiegel would be bound if he failed to make those exceptions. If "subject to" is no more than a description of the interest conveyed, then he was powerless to enlarge upon it by making "exceptions." He could no more change the nature of the interest conveyed than the grantee of land subject to a mortgage could enlarge his interest by making exceptions to the mortgage note. Mr. Klein's tenacious insistence on using "take subject to" instead of "assume" suggests that he was not unacquainted with the mortgage cases. But the difference is that the grantee in such cases has no need and no power to make exceptions to the mortgage. Mr. Klein knew that there was both the power and the need to make exceptions to this lease, because he knew that Spiegel was accepting a personal obligation. If it was not a personal obligation, then there was nothing for Mr. Klein to make exceptions to. By his own testimony, and despite his avoidance of the literal term, the lawyer who drew the instrument all but admitted that the contract constitutes an assumption of the lease.

The correctness of this construction of the contract is further shown by Spiegel's own conduct. The original lease provides that the lessee shall pay a part of the dif-

ference in cost between eight point insurance and fire insurance. Spiegel did that for four years. The lease provides that the lessee shall pay a share of the cost of boiler insurance. Spiegel did that for four years, too. The lease provides that the lessee shall pay a part of the cost of maintaining the heating system, and Spiegel did that for four years. No mention is made of any of these matters except in the lease. The plain inference arises that Spiegel considered itself bound by the provisions of the lease until it was suddenly handed a tax bill for four and a half thousand dollars. Then, for the first time, it decided that the lease attached to its contract was a little stranger.

At the trial, of course, Mr. Klein testified that these payments were made without his knowledge, or without authorization of the legal department. This was a matter peculiarly within the knowledge of the defendant, and Coles is in no position to dispute it. But it seems odd that a bill submitted to Spiegel should be paid without question. Surely it is not customary for large department stores to pay any claim that happens to be addressed to them. But whether Mr. Klein, himself, knew of these payments or not, *some* agent of Spiegel's knew of them, and Spiegel performed its obligations under the lease for four years. This is a matter of legitimate consideration in construing the contract. *National City Bank of Cleveland v. Citizens Building Co.,* 74 N.E.2d 273 (Ohio App. 1947); *Pendleton v. Brown,* 25 Ariz. 604, 221 Pac. 213 (1923).

From all of these circumstances (whatever might be the situation if only one of them were present) the conclusion is inescapable that Spiegel assumed the obligations of the lease: The attaching of the original lease, the incorporation

provision, the "notwithstanding" clause, the phrase "subject to the terms of," the provision for obtaining consent from the owner to sub-lease, the "exceptions" explained by Mr. Klein, the performance of the obligations by Spiegel for four years, and the fact that Mr. Klein himself drew up the contract—all these when taken together leave room for no construction other than that of an assumption by Spiegel.

The District Court erred in ruling that the contract imposed no obligation on Spiegel to pay the taxes, and in finding that it was not the intention of the parties to impose such an obligation.

II. The Contract Constitutes an Assignment and Places the Burden on Spiegel to Pay the Taxes as a Matter of Law.

Everything that has been said in the first part of this brief applies to an assignment as well as to an assumption, since a complete assumption would include an assignment. All the considerations there advanced demonstrate that the contract was intended to act as an assignment, whatever it may have been called.

However, even if the contract did not include the lease, and even if it made no reference to the lease, Spiegel would nevertheless be obligated to pay the taxes. Since the instrument in question is in reality an assignment, Spiegel becomes bound by all covenants that run with the land, including the covenant to pay taxes. On these covenants, Spiegel is the one ultimately liable. Since Coles has suffered a loss by Spiegel's failure to perform, Coles is entitled to reimbursement.

A. THE CONTRACT IS AN ASSIGNMENT.

The Supreme Court of Arizona seems to have passed only once on the difference between a sub-lease and an assignment. That was the case of *Shreck v. Coates,* 59 Ariz. 269, 126 Pac.2d 308 (1942), where the court held that the retention by the original lessee of a right to occupy and engage in mining operations was sufficient to make the contract a sub-lease. In its opinion the court included the following quotation from American Jurisprudence:

> "'An assignment of a leasehold is a transaction whereby a lessee transfers his entire interest in demised premises or a part thereof for the unexpired term of the original lease, thereby parting with all of the reversionary estate in the property, and is thus distinguishable from a sublease which contemplates the retention of a reversion by the lessee. The form of the transaction is not material, its character in law being determined by its legal effect. * * *' 32 Am. Jur. 289, sec. 313."

By applying this test it becomes evident that the instrument now before the court is an assignment. The form of the instrument being immaterial, it makes no difference that the parties referred to one another as "lessor" and "lessee." Coles parted with all its interest in the land. There was nothing left of which Coles could be the lessor. The transfer was made for the entire term, and with "all the rights, privileges and benefits granted" Coles under the lease from the owner (R. 17). The fact that there are provisions in the contract which are not contained in the lease is immaterial. A reservation of a contractual right is not an interest in land and will not support a sub-lease.

In *Marathon Oil Co. v. Lambert,* 103 S.W.2d 176 (Tex. Civ. App. 1937), the lessee of land entered into a contract purporting to be a sub-lease which provided that: The original lessee should be obligated to make repairs; the "sub-lessee" could pay the owner if the original lessee should default; and if the use of the premises for the particular purpose should be prohibited by law, then the "sub-lessee" would have an option to terminate. The court pointed out that none of these provisions gave any property right to the original lessee and so, since the entire term had been transferred, the arrangement was an assignment.

The court said (p. 180):

> "We think it apparent that these provisions were placed in the contract for the exclusive benefit of the appellant, that it alone could have claimed a right thereunder, and that neither evidences the slightest intention * * * to retain a reversionary interest in the leased premises. A reversionary interest is a property right that belongs to the grantor, hence it is incongruous to say that such an interest may be based upon a provision of the conveyance inserted for the benefit alone of the grantee."

And in *Consolidated Coach Corp. v. Consolidated Realty Co.,* 251 Ky. 614, 65 S.W.2d 724 (1933), an instrument purporting to be a sub-lease was held to be an assignment, notwithstanding the fact that it contained a covenant by the "sub-lessee" not to use the property for a particular business. The court held that such a covenant did not reserve in the original lessee any right to use the property, and so did not constitute a reversion. The following paragraph was quoted from *Sexton v. Chicago Storage Co.,* 129 Ill. 318, 21 N.E. 920 (1889):

> "* * * The more recent English decisions, and all of the text-books treating of the question which have been accessible to us, hold that, where all of the lessee's estate is transferred, the instrument will operate as an assignment notwithstanding that words of demise instead of assignment are used, and notwithstanding the reservation of a rent to the grantor, and a right of reentry on the non-payment of rent or the non-performance of other covenants contained in it. * * *"

In the case at bar, the lessee did not reserve a right of entry for non-payment of the rent, nor did it reserve such a right on any other condition. The fact that the second agreement contains a promise to pay rent does not change the result. *Smiley v. Van Winkle,* 6 Cal. 606 (1856). Since Coles transferred all its interest in the land, the money payable to it is not, properly speaking, rent at all, but a contractual obligation arising from the assignment.

In *Taylor v. Marshall,* 255 Ill. 545, 99 N.E. 638 (1912), the lessee, under a lease providing for a $100 monthly rental, "sub-leased" the premises for the remainder of the term at $150 a month. A judgment creditor levied on the interest of the original lessee under a statute providing for liens on leasehold interests. The court held that the levy was void, since at the time, the original lessee no longer possessed any leasehold interest. The transfer was an assignment despite the reservation of rent and of a right of reentry. The reservation of the $150 monthly payment was a contractual right, not a property right, and consequently there was nothing upon which the levy could be made.

None of the terms of the contract here before the court can be construed as reserving any property right in the

plaintiff. All the provisions dealing with the land are obviously there for the sole benefit of Spiegel, and constitute an undertaking by Coles to relieve Spiegel from a part of the burden imposed by the covenants. A contractual *obligation* is not a property *right*.

There is in the contract no evidence of any intention that Coles should continue to exercise dominion over the property. Coles transferred to Spiegel all its "rights, privileges, and benefits," by the very terms of the contract (R. 17). If the parties had intended that Coles should maintain an interest in the land itself, the natural thing would have been to reserve to Coles a right of entry for breach of Spiegel's promises to pay rent and make repairs. No such right was reserved. (Even if it had been, this would still be an assignment. *Taylor v. Marshall, ante*).

There is, in fine, no indication that Coles should have any rights whatsoever in the land. By the terms of the contract, there is no contingency on the occurrence of which Coles would have a right to repossess. Spiegel received everything that Coles could grant.

B. SPIEGEL, AS ASSIGNEE, IS LIABLE ON THE COVENANT TO PAY TAXES.

By entering into possession under this contract, Spiegel bound itself to perform all covenants except those which might be personal between Coles and the owner. On covenants which run with the land, the tenant in possession is the party ultimately liable, since he is the one in privity of estate with the owner. The owner may require Coles to perform because of the privity of contract existing between them, but such a performance by Coles gives it a right of action against Spiegel. Coles is in a position similar

to that of a surety, and, upon a default by the tenant, it may cure the default and recover from the tenant.

Mason v. Smith, 131 Mass. 510 (1881), was an action brought by a lessee against his assignee to recover for taxes which the lessee had been required to pay to the owner. The court gave judgment for the lessee, saying (p. 512):

> "The assignee of a lessee takes the whole estate of the lessee in the premises, subject to the performance on his part of the covenants running with the land, under the terms of the lease. By accepting and entering under the assignment, the law implies a promise to perform the duties thus imposed upon him. If through his neglect or refusal to perform them, the lessee is obliged to pay rent, taxes or other sums of money to the lessor under the covenants of his lease, he may recover the same from his assignee. * * *"

Moule v. Garret, L. R. 5 Exch. 132 (1870), was a similar action brought by the lessee against his assignee. In holding for the plaintiff the court said this:

> "It is true that there is no express contract between the parties, but they are each liable to the lessor for the performance of the covenants. They are each directly liable, and the lessor may sue either, at his option; but the assignee, having, at the time, the estate which has been the consideration for the covenants, ought, as between himself and the lessee, to perform them."

To the same effect are:

Kewanee Boiler Corp. v. American Laundry Mach. Co., 289 Ill. App. 482, 7 N.E.2d 461 (1937);

Crowley v. Gormley, 59 App. Div. 256, 69 N.Y.S. 576 (1901);

McKeon v. Wendelken, 25 Misc. 711, 55 N.Y.S. 626 (1899);

Burnett v. Lynch, 5 Barn & C. 589, 108 Eng. Reprint 220 (1826).

Therefore, even if one ignores the indications of an express assumption, the liability for these taxes nevertheless rests upon Spiegel. This is entirely proper. Spiegel took from Coles all the interest in the land that Coles had. He who gets the benefit of ownership must bear its burdens. That the foregoing axiom applies here, appears from other tax cases. When an owner of land leases it to another for a period of years with no stipulation as to who shall pay the taxes, that liability ordinarily rests with the landlord. He is the underlying owner, and whatever is a benefit to the land is a benefit to him. And so it will be presumed that, as between the parties, he was intended to pay the taxes. But where the lease is for a very long term, such as ninety-nine years, the landlord's ownership becomes something insubstantial. In such cases the tenant is the owner in all else but name, for the landlord has transferred practically all he had. So the rule changes, and the tenant rather than the landlord is presumed to have agreed to pay the taxes. *Hughes v. Young,* 5 Gill & J. 67 (Md. 1832); *Ocean Grove Camp Meeting Ass'n. of M. E. Church v. Reeves,* 79 N.J.L. 334, 75 A. 782 (1910).

In the instant case, the lessee expressly undertook to pay taxes if they should exceed a certain amount. Since Coles would be the one to gain from a future increase in the value of the property, it was appropriate that Coles should pay whatever taxes might result from such an increase in value. But after Coles transferred the property,

Coles could no longer receive that benefit. The transferee —Spiegel—then became the one to benefit by any such appreciation.

The value of a store building located in the downtown section of a growing western city can increase tremendously over a period of fourteen years. Coles gets no benefit from such a development, since it no longer has any interest in the building. The rule of law which requires Spiegel to pay these taxes is not simply a technicality of property law, it is a rule of presumed intention. Since the occupant of the premises receives the benefit of any increase in the value of the land, it is presumed that the parties intend him to bear the burdens that might accompany such an increase. Of the three parties involved, Coles, alone, is the one who derives no benefit whatsoever from an appreciation in the value of the land.

If the tax payments due under the lease can jump from zero to four and a half thousand dollars in one year, it is not inconceivable that they may increase to eleven or twelve thousand dollars during the succeeding ten years during which the contract remains in effect. If the contentions of Spiegel were allowed, then Coles would have to pay to the owner as rent and taxes more money than it received from Spiegel as consideration for the transfer, a result which Coles certainly would not have permitted, and which neither party could have contemplated. Doubtless the parties could have agreed to shift this liability to Coles, but they have not done so. Spiegel, therefore, remains liable.

The District Court clearly erred in ruling that no legal obligation had been proved requiring Spiegel to pay the taxes.

CONCLUSION

It might be contended that this arrangement, construed either as a simple assignment or as both an assignment and an assumption, was an inartistic means of accomplishing what was intended to be accomplished. If that is so, it is immaterial. Artistry is no prerequisite to legality.

Whether the instrument is construed as a sub-lease, as an assignment, or as an assumption, or as both an assignment and an assumption, Coles ought to have prevailed in the lower court.

Wherefore, Coles respectfully urges this Honorable Court to enter judgment in its favor.

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